Supreme Court, U.S.
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No. 83-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SMITH CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION,

Petitioner,

v.

THE UNITED STATES, BROTHER INDUSTRIES, LTD., BROTHER INTERNATIONAL CORPORATION, SILVER SEIKO, LTD., AND SILVER REED AMERICA, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. THIS CASE PRESENTS SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO GRANT CERTIORARI.

In its opposition, Brother argues that this Court should deny SCM's Petition for Certiorari ("Petition") because "[t]here is neither an actual nor potential conflict with the view of any other circuit, in view of the exclusive subject-matter jurisdiction of the courts below." Brother Opp.16.[1] The government makes a similar argument. U.S. Opp. 8.

[1] References to Respondent United States Opposition Brief are designated U.S. Opp. ____; references to Respondents Brother In-

If this Court were to premise its denial of certiorari on the basis that the opinion is not in conflict with other courts of appeals, this Court would be precluded from examining decisions from the Federal Circuit since that court's jurisdiction is exclusive as to the matters at issue, and thus cannot conflict with decisions of other circuits. However, this Court's discretion is not so artificially limited. Supreme Court Rule 19(1)(b) explicitly permits review where "an important question of federal law has not been, but should be, settled by this Court" or where a court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

This case meets both of these requirements of Rule 19(1)(b).

The brief of the United States does not deny, and indeed, like the two lower court decisions, confirms the far reaching importance of this case.[2] *Smith-Corona Group, Consumer Products Division, SCM Corporation v. United States*, 713 F.2d 1568 (CAFC 1983) (Pet. App. 1a), is the first judicial opinion reviewing the administering authority's pivotal regulations meant to implement legislation critical to protecting United States commerce from the pernicious effects of "dumping," or selling foreign goods in the U.S. market at prices lower than their fair value. One or both of the challenged regulations—one concerns an "offset" reducing home market price and the other creates a reliance on costs to explain away price discrimination—are central in virtually every antidumping

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dustries, Ltd., and Brother International Corporation's Opposition Brief are designated "Brother Opp. ____;" references to the Petition are designated "Pet. ____."

[2] In its opinion, the Court of International Trade said, "We are faced in this consolidated action with a number of highly complex issues which are of novel impression, and undoubtedly are of great significance in the administration of the nation's antidumping laws," *Brother Industries, Ltd.* v. *United States*, 3 CIT 125, 540 F. Supp. 1341, 1345 (1982) (Pet. App. 28a).

case. Thus, this case will set the future course of the Commerce Department and the Court of International Trade in antidumping matters.

The impact of foreign trade on our national economy has become increasingly critical. Judicial reluctance to intervene in what Congress has long considered a delinquent administration of the unfair trade laws will have incalculable adverse impact on American industry and its workers. The effective enforcement of the remedial provision of these laws where violations have been found, as in the instant case, is thus of great national importance, and so is worthy of consideration by the Supreme Court.

II. ADMINISTRATIVE ACTION MUST BE WITHIN THE LIMITS OF THE STATUTE; CONSEQUENTLY FAIR ADMINISTRATION OF THE ANTIDUMPING LAW REQUIRES INVALIDATION OF THE SPECIAL RULE.

Brother states that "petitioner has failed to address the question of how the antidumping law could be administered fairly without the ESP offset rule which petitioner seeks to have invalidated." Brother Opp. 21. Brother explains that petitioner's position would result in increased antidumping duties "solely because of the deduction from Exporter's Sales Price of indirect expense for selling in the United States required by the statute, absent a balancing deduction for similar actual home-market expenses." *Id.* Similarly, the government's brief argues that the Special Rule is needed "for there to be a fair and equitable price comparison." U.S. Opp. 10.

The Special Rule is not fair. It discriminates between parties Congress sought to treat equally (related and unrelated importers) to the detriment of the intended statutory beneficiary, the domestic industry. The Special Rule results in higher dumping duties being imposed on goods from foreign manufacturers who sell to independent importers than the duties imposed on foreign manufacturers using related-party importers. Congress was suspicious of manufacturers using related

importers because these transactions could be manipulated to evade the dumping laws. Congress designed the statute to protect against such abuses.

To safeguard against duty evasion and impose uniform duties without regard to the importer's status, the statute provides two equivalent formulas for assessing duties. The two-formula approach addresses the problem of how to determine a consistent U.S. price given the Congress' suspicion of related importers. In both formulas, foreign market value and U.S. price are compared to establish the dumping margin and corresponding duty. Both formulas determine foreign market value the same way; U.S. price is determined differently.

The formula applicable to independent importers bases the U.S. price on the Purchase Price the independent importer pays the foreign manufacturer since that is an arm's length transaction. In an Exporter's Sales Price transaction, however, since the foreign manufacturer can manipulate the sales price to its controlled importer, the statute looks to the first arm's length transaction, which occurs when there is a sale in the U.S. market to a third party. To achieve a uniform result in a related party transaction, under the statute that price to a third party is adjusted to eliminate the U.S. selling expense of the related importer. As adjusted, the price provides an estimate of what the f.o.b. foreign country selling price to the importer would have been at arm's length. These statutorily required deductions from Exporter's Sales Price are necessary to yield consistent results in both Exporter's Sales Price and Purchase Price transactions.

The Special Rule changes the statutory calculus for related party transactions in a remarkable way. The Special Rule "offsets" the statutorily required deduction of U.S. selling expense from the Exporter's Sales Price.[3] Thus, the Special

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[3] As the Circuit Court acknowledged, "the offset does permit negation of one specific statutory adjustment," 713 F.2d at 1579 (Pet. App. 20a).

Rule requires an automatic deduction of an equivalent amount of the foreign manufacturer's selling expense in the foreign market, thereby reducing the foreign market value. In an independent importer (Purchase Price) transaction, consistent with the statute, the Secretary makes no such deduction from the foreign market value.[4] The Special Rule automatically lowers the duties only for related party importers, thus resulting in discriminatory treatment.

The Federal Court acknowledges this "skew" but blames it on Congress, saying: "If the statute is skewed by the offset it is because the Secretary, in constructing a fair comparison, has erected the offset on a foundation that was already slightly askew," 713 F.2d at 1579 (Pet. App. 21a).

One thing that is certain from reading the legislative history is that Congress did not intend to "skew" enforcement in favor of related-party transactions, transactions which were by their very nature regarded as suspect. The only justification the court advanced for this discriminatory tampering is that the Special Rule is "fair," even though it results in disparate dumping duties depending upon the status of the importer. However, Congress mandated a comparison of U.S price with foreign market value without such automatic deductions for foreign selling expenses. Appropriate adjustments to foreign market value are already carefully provided in the statute for differences in circumstances of sale.

Implicit in the argument advanced by respondents is the notion that the judiciary and the administrative agency are the

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[4] The Court of Appeals acknowledged the unambiguous statutory language: "The statute does refer repeatedly to foreign market value, as if there were only one foreign market value under consideration" 713 F.2d at 1578 (Pet. App. 19a). But the court simply ignores the statute and endorses the substitution of two foreign market values with the justification that ". . . the statute does not expressly foreclose the use of two different United States price-foreign market value comparisons." *Id.*

arbiters of what is fair. Both court and agency have perverted the expressed intent of the Congress that the agency administer the statute fairly, presuming that fair administration of the law permitted the agency to alter fundamentally the bounds of its discretion as laid down by the statute.

When Congress delegates authority to administrative agencies, the duty of the courts is to assure that administrators abide by the standards limiting agency discretion and that "administrative activity [does not] reach beyond the limits of the statute that created it." *Immigration and Naturalization Service* v. *Chadha*, ___ U.S. ___, 103 S. Ct. 2764, 2785, n. 16 (1983). Thus, the government's reliance on the Court of Appeals' statement that "the Special Rule offset is necessary 'to achieve a broader statutory purpose otherwise frustrated because of the alternative statutory methods of computing United States price,' " is clearly misplaced. U.S. Opp. 11. The Court of Appeals' statement shows that the court knew that the Special Rule was in derogation of the statute, yet the court still upheld it. Neither the courts nor the agency have the constitutional authority to rewrite the statute, violating standards laid down in the statute, eliminating a statutory requirement, and supplanting the judgment of Congress with their own vision of "fairness."[5]

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[5] The appellate court's actions contradict this Court's recent holding in *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, ___ U.S. ___, 104 S. Ct. 439, 444 (1983), in which this Court said:

> [W]hile reviewing courts should uphold reasonable defensible constructions of an agency's enabling Act, . . . they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that *frustrate the congressional policy underlying a statute.*"

(citations omitted) (emphasis supplied). In determining that the administrating agency has made an "unauthorized assumption . . . of [a] major policy decision . . . properly made by Congress," the Court cited *American Ship Building v. National Labor Relations Board*, 380 U.S. at 316, 318 (1965), where it found that the NLRB had

Respondents' allegations that SCM has failed to explain how the statute could be fairly administered miss the point. *Congress* has already explained in the statute how to compare fairly Exporter's Sales Price with foreign market value. 19 U.S.C. § 1677a.

III. THE PETITION FOR CERTIORARI IN THE INSTANT CASE IS PROPERLY BEFORE THE COURT

A. Review by Writ of Certiorari is Proper.

Brother insists that the Petition is not properly before this Court. With no citation of authority whatsoever, Brother urges that petitioner's arguments "should be disposed of by a rehearing" in the Court of Appeals, and that "Petitioner . . . should not be heard in this Court." Brother Opp. 16, 18.

To the contrary, Congress has provided that:

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

28 U.S.C. § 1254(1). It is axiomatic that "the jurisdiction thus granted is of an extremely comprehensive nature. . . . There are no limitations as to the parties, the status of the case, or the amounts in controversy." R. Stern & E. Gressman, *Supreme Court Practice*, (5th Ed. 1978) § 2.1, at 52. Neither the Federal Rules of Appellate Procedure nor the Rules of the Supreme Court require a party to petition the court of appeals for rehearing before petitioning this Court for writ of certiorari.

B. The Issues Presented in the Petition for Certiorari are Correctly Before This Court.

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construed its functions too expansively when it claimed general authority to define national labor policy by balancing the competing interests of labor and management. The authority to define major policies, including the fundamental fairness of a statutory scheme, is entrusted to the Congress, not to administrative agencies.

Brother claims that petitioner has raised new issues that this Court therefore cannot hear. Brother Opp. 17-18. Brother represents,

> The closest petitioner came in the court below to raising the constitutional issue was an admonitory footnote in its Brief for Appellant (at page 18, note 8) to the effect that "[c]ourts will avoid interpreting a statute in a manner which would render it an unconstitutional delegation."

Brother Opp. 17, n. 60. This is simply wrong.

It is not true, as Brother states, that "Petitioner's presentation implies that the appellate court's opinion for the first time created the . . . 'irrebuttable presumption' issues the petitioner poses." Brother Opp. 17. The Reply Brief for Appellant in the Court of Appeals fully sets forth this issue, plainly showing:

> If situations exist where a producer is willing to set prices below marginal cost, no valid irrebuttable presumption can exist based on the premise that prices will always reflect differences in incremental costs. It is just this invalid assumption which was codified in 1976 in [the Cost Rule] . . . and is applied *automatically* under present agency practices. . . . There is "no rational connection between the fact proved and the ultimate fact presumed," *Tot* v. *United States*, 319 U.S. 463 (1943).

Reply Brief for Appellant, 17-18, and 14 *et seq.*, December, 1982. *See also*, Brief for Appellant, at 19-20 and 27-33, September, 1982.

Brother similarly claims that petitioner newly argues that in light of the Special Rule, the Act unlawfully delegates legislative authority. Brother Opp. 17. Such an assertion misses the point. Petitioner does not contend that Congress unlawfully delegated power to the administering authority within the meaning of *A.L.A. Schechter Poultry* v. *United States*, 295 U.S. 495 (1935). Rather, petitioner maintains that the statute lawfully delegates legislative authority, *so long as it is con-*

strued consistently with the standards limiting agency discretion. The Federal Circuit adopted a construction that renders the statute unconstitutional, in derogation of its responsibility to construe legislation consistently with Congressional intent so as to comport with constitutional limitations. *National Cable Television* v. *United States*, 415 U.S. 336 (1974).

Furthermore, the issue of whether the Court's interpretation renders the statute unconstitutional is in any event properly before this Court in accordance with the general rule that the Supreme Court will consider issues raised in the petition for certiorari which arose from the opinion of the appellate court itself. *Ana Maria Sugar Co.* v. *Quinones*, 254 U.S. 245 (1920). An appeal from an error committed by a lower court is fundamentally different from an attempt to introduce at the appellate level a new theory that had previously been overlooked or disregarded. The appropriate time to raise an error of the appellate court is in a petition for certiorari.

CONCLUSION

For the reasons stated here and in the Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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